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Majlis Peguam v Ch'ng Eng Hing, Frank

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-704–04 OF 2023
KAMALUDIN MD SAID, HASHIM HAMZAH AND COLLIN SEQUERAH JJCA
13 MAY 2024

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Legal Profession — Disciplinary proceedings — Powers of disciplinary board — Disciplinary board remitted the matter to disciplinary committee to make finding of the respondent's liability — Whether the disciplinary committee could recommend punishment — Whether correct in law — Legal Profession (Disciplinary Proceedings) Rules 2017 r 28

D

This was the appellant's/intervener's appeal against the decision of the learned High Court judge ('HCJ') on 27 March 2023 in allowing the appeal against the appellant's order dated 26 February 2023. This appeal related to the power E of the appellant (Disciplinary Board) ('DB') in directing its Disciplinary Committee ('DC') to make a finding on the respondent's liability vide a letter dated 19 April 2019 pursuant to r 28 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ('2017 Rules'). The respondent was appointed by the complainant to handle a legal matter against CIMB on her behalf. The F complainant paid the sum of RM50,100 to the respondent. There was a dispute as to whether the said sum was paid by way of a retainer for the specific purpose of initiating legal action against CIMB or whether it was also in relation to other matters involving legal matters relating to the complainant, her son and her former companies. On 18 November 2016, the complainant G informed the respondent that she would handle her legal matters and her companies' legal matters on her own. The complainant subsequently lodged a complaint against the respondent through a letter dated 12 February 2017 to the Advocates and Solicitors Disciplinary Board ('DB') of the appellant. On 11 January 2018, the DB appointed a Disciplinary Committee ('DC') to H investigate the complaint pursuant to s 103A of the Legal Profession Act 1976 ('the LPA. The matter was then referred to the DB. On 19 April 2019, the DB directed the DC to make a finding on the respondent's liability. On 20 January 2020, the DC found that the respondent was dishonest and committed fraud against the complainant. It accordingly held that the respondent was guilty and I imposed a fine of RM5,000 on him. The DC further ordered the respondent to render the bill of charges for work done and disbursement incurred and refund the balance of the RM50,000 retainer to the complainant ('the second finding'). The DB issued the order under s 103D of the LPA ('the DB order') which affirmed the Disciplinary Committee's finding of liability and

recommendation on punishment for fine in pursuant to s 103D(1) of the Act, for the respondent to pay a fine of RM5,000 only payable to the Discipline Fund within one month from the date of the order. Pursuant to that, the respondent filed an originating summons ('OS') to appeal against the said DB order. The Bar Council filed an application to intervene in the OS. On 9 August 2022, the learned HCJ allowed the application to intervene, there being no objection from the parties. The HCJ therefore held that the DB had committed an error of law that warranted appellate intervention and, in the premises, allowed the appeal by the respondent and set aside the DB order. Thus, the Bar Council appealed. The issue for determination was whether the procedure adopted by the DB when it remitted back the matter to the DC and directing the DC to make a finding on the respondent's liability and in recommending punishment in the event the respondent was guilty, was correct in law.

Held, dismissing the appeal:

(1) The court was of the considered view that the grounds of judgement of the HCJ showed that he had carefully set out and analysed r 28 and correctly concluded that the phrase 'directions' in r 28 were by virtue of their ordinary and plain reading, limited to matters of procedure only. The HCJ also correctly concluded that given that the standard of proof was beyond reasonable doubt, the DB at the very least, ought to have taken the finding of the DC as a dismissal of the compliant (see paras 51 & 55).

(2) The HCJ thus correctly found that the DB had committed an error when by way of its letter to the DC of 19 April 2019, it stated 'your committee did not make a finding as to whether the respondent is liable or otherwise'. DB had no powers accorded to it to remit the matter back to the DC in respect of a substantive finding whether of guilt or otherwise. The DC had made a clear finding of not guilty in respect of the respondent (see paras 56–58).

(3) Once the DC had made such a finding, the powers of the DB was either to reject or to affirm the finding as provided for under s 103D(1) of the LPA. In this court considered view, the HCJ rightly concluded that if the DB was not agreeable with the findings of the DC, it should have rejected the finding and substitute it with its own decision in respect of liability and if, it found it necessary to impose any punishment, to act pursuant to s 103D(4) and notify the respondent of such intention and accord him a reasonable opportunity of being heard. It was clear upon a plain and obvious reading of r 28 of the 2017 Rules that the DB may only give directions to the DC on matters of procedure and not in respect of matters of a substantive nature. The HCJ had not therefore erred in

finding that the DC had committed an error of law that warranted appellate intervention (see paras 59–62).

[Bahasa Malaysia summary

Ini adalah rayuan perayu/pencelah terhadap keputusan Hakim Mahkamah Tinggi ('HMT') yang bijaksana pada 27 Mac 2023 yang membenarkan rayuan terhadap perintah perayu bertarikh 26 Februari 2023. Rayuan ini berkaitan dengan kuasa perayu (Lembaga Tatatertib) ('DB') dalam mengarahkan Jawatankuasa Tatatertibnya ('DC') untuk membuat dapatan mengenai liabiliti responden melalui surat bertarikh 19 April 2019 menurut k 28 Kaedah-Kaedah Profesion Undang-Undang (Prosiding Tatatertib) 2017 ('Kaedah 2017'). Responden telah dilantik oleh pengadu untuk mengendalikan hal undang-undang terhadap CIMB bagi pihaknya. Pengadu membayar sejumlah RM50,100 kepada responden. Terdapat pertikaian sama ada jumlah tersebut telah dibayar sebagai retainer untuk tujuan khusus untuk memulakan tindakan undang-undang terhadap CIMB atau sama ada ia juga berkaitan dengan perkara lain yang melibatkan perkara undang-undang yang berkaitan dengan pengadu, anaknya dan bekas syarikatnya. Pada 18 November 2016, pengadu memaklumkan responden bahawa dia akan mengendalikan sendiri hal undang-undang dan hal undang-undang syarikatnya. Pengadu kemudiannya membuat aduan terhadap responden melalui surat bertarikh 12 Februari 2017 kepada Lembaga Tatatertib Peguambela dan Peguamcara ('DB') terhadap perayu. Pada 11 Januari 2018, DB melantik Jawatankuasa Tatatertib ('DC') untuk menyiasat aduan itu menurut s 103A LPA. Perkara itu kemudiannya dirujuk kepada DB. Pada 19 April 2019, DB mengarahkan DC untuk membuat dapatan mengenai liabiliti responden. Pada 20 Januari 2020, DC mendapati responden tidak jujur dan melakukan penipuan terhadap pengadu. Ia sewajarnya memutuskan bahawa responden bersalah dan mengenakan denda RM5,000 ke atasnya. DC seterusnya memerintahkan responden untuk mengemukakan bil caj untuk kerja yang dilakukan dan perbelanjaan yang ditanggung dan memulangkan baki retainer RM50,000 kepada pengadu ('dapatan kedua'). DB mengeluarkan perintah di bawah s 103D LPA ('perintah DB') yang mengesahkan dapatan liabiliti dan syor Jawatankuasa Tatatertib mengenai hukuman denda menurut s 103D(1) Akta tersebut, bagi responden membayar denda sebanyak RM5,000 sahaja dalam tempoh satu bulan daripada tarikh perintah itu. Selaras dengan itu, responden memfailkan saman pemula ('SP') untuk merayu terhadap perintah DB tersebut. Majlis Peguam memfailkan permohonan untuk mencelah dalam SP itu. Pada 9 Ogos 2022, HCJ yang bijaksana membenarkan permohonan untuk campur tangan, kerana tiada bantahan daripada pihak-pihak. Oleh itu HMT memutuskan bahawa DB telah melakukan kesilapan undang-undang yang memerlukan campur tangan rayuan dan, berdasarkan premis itu, membenarkan rayuan oleh responden dan mengetepikan perintah DB. Justeru, Majlis Peguam merayu. Isu untuk penentuan adalah sama ada prosedur yang diterima pakai oleh DB apabila ia menyerahkan semula perkara

itu kepada DC dan mengarahkan DC untuk membuat dapatan mengenai liabiliti responden dan dalam mengesyorkan hukuman sekiranya responden bersalah, adalah betul di sisi undang-undang.

Diputuskan, menolak rayuan:

(1) Mahkamah berpendapat bahawa alasan penghakiman HMT menunjukkan bahawa beliau telah menetapkan dan menganalisis dengan teliti k 28 dan dengan betul membuat kesimpulan bahawa frasa 'arahan' dalam k 28 adalah berdasarkan bacaan biasa dan jelasnya, terhad kepada perkara prosedur sahaja. HMT juga membuat kesimpulan dengan betul bahawa memandangkan piawaian pembuktian adalah di luar keraguan munasabah, DB sekurang-kurangnya, sepatutnya mengambil dapatan DC sebagai penolakan pematuhan (lihat perenggan 51 & 55).

(2) Oleh itu HMT dengan betul dalam dapatan bahawa DB telah melakukan kesilapan apabila melalui suratnya kepada DC pada 19 April 2019, ia menyatakan 'jawatankuasa anda tidak membuat dapatan sama ada responden bertanggungjawab atau sebaliknya'. DB tidak mempunyai kuasa yang diberikan kepadanya untuk menyerahkan perkara itu kembali kepada DC berkenaan dengan dapatan substantif sama ada bersalah atau sebaliknya. DC telah membuat dapatan jelas tidak bersalah berkenaan dengan responden (lihat perenggan 56–58).

(3) Sebaik sahaja DC telah membuat dapatan sedemikian, kuasa DB adalah sama ada untuk menolak atau mengesahkan dapatan itu sebagaimana yang diperuntukkan di bawah s 103D(1) LPA. Dalam pandangan yang dipertimbangkan mahkamah ini, HMT dengan betul membuat kesimpulan bahawa jika DB tidak bersetuju dengan dapatan DC, ia sepatutnya menolak dapatan itu dan menggantikannya dengan keputusannya sendiri berkenaan dengan liabiliti dan jika, ia mendapati perlu untuk mengenakan apa-apa hukuman, untuk bertindak menurut s 103D(4) dan memberitahu responden niat tersebut dan memberikan dia peluang munasabah untuk didengari. Ia adalah jelas apabila membaca k 28 Kaedah 2017 bahawa DB hanya boleh memberi arahan kepada DC mengenai perkara prosedur dan bukan berkenaan dengan perkara yang bersifat substantif. Oleh itu hakim Mahkamah Tinggi tidak tersilap dalam mendapati bahawa DC telah melakukan kesilapan undang-undang yang memerlukan campur tangan rayuan (lihat perenggan 59–62).]

Legislation referred to

Legal Profession (Disciplinary Proceedings) Rules 2017 r 28
Legal Profession Act 1976 ss 100(1)(b)(i), (1)(b)(ii), 103A, 103D, 103D(1), (3), (4)

Appeal from: *Ch'ng Eng Hing, Frank v Tok Tiak Hoong (Majlis Peguam, pencelah)* [2023] MLJU 1505 (High Court, Kuala Lumpur)

Ong Eng Hong (Rahmat Lim & Partners) for the appellant.
Verghese Aaron Mathews (with Khor Chai Hoong) (Tang, Khor & MP Leong) for the respondent.

Collin Sequerah JCA:

INTRODUCTION

[1] This is the appellant's/intervener's appeal against the decision of the learned High Court judge ('HCJ') on 27 March 2023 in allowing the appeal against the appellant's order dated 26 February 2023.

[2] This appeal relates to the power of the appellant (Disciplinary Board) ('DB') in directing its Disciplinary Committee ('DC') to make a finding on the respondent's liability vide a letter dated 19 April 2019 pursuant to r 28 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ('the 2017 Rules').

BACKGROUND FACTS

[3] The pertinent facts that led to this appeal emanate from the appointment of the respondent who is a practicing lawyer and was appointed by the complainant, Tok Tiak Hoong ('the complainant') to handle a legal matter against CIMB on her behalf.

[4] There is no dispute that the complainant paid the sum of RM50,100 to the respondent.

[5] There exists a dispute as to whether the said sum was paid by way of a retainer for the specific purpose of initiating legal action against CIMB or whether it was also in relation to other matters involving legal matters relating to the complainant, her son and her former companies, Hock Sang Realty and Hock Sang Travel Centre (M) Sdn Bhd.

[6] On 18 November 2016, the complainant informed the respondent that she will handle her legal matters and her companies' legal matters on her own.

[7] The complainant subsequently lodged a complaint against the respondent through a letter dated 12 February 2017 to the Advocates and Solicitors Disciplinary Board ('DB') of the appellant, which was registered as Complaint No DB/17/0093.

[8] The DB then issued a letter dated 2 June 2017 to the respondent and requested for an explanation from him pursuant to s 100(1)(b)(i) and (ii) of the Legal Profession Act 1976 ('the LPA'). A

[9] On 16 June 2017, the respondent submitted his written explanation to the DB. B

[10] On 6 July 2017, the DB requested the complainant to submit the response to the respondent's written explanation but the complainant did not respond. C

[11] On 11 January 2018, the DB appointed a Disciplinary Committee ('DC') to investigate the complaint pursuant to s 103A of the LPA.

[12] On 13 March 2018, the DC proceeded with the hearing of the complaint ('the DC hearing') but did not make any definitive ruling ('first finding') but instead stated as follows: D

> There is no 'clear cut' of the meaning of retainer. Subject to DB['s] ruling.

E

[13] The matter was then referred to the DB. On 19 April 2019, the DB directed the DC to make a finding on the respondent's liability. The letter, which was addressed to the chairman of the DC, inter alia, stated as follows:

> Hence, pursuant to Rule 28 of the Legal Profession (Disciplinary Proceedings) Rule 2017, the Board hereby directs your Committee [to] make a finding on the Respondent's liability and if so find liable, to make the appropriate recommendation on punishment pursuant to Section 103C of the Legal Profession Act, 1976. F

[14] The DC then reconvened as directed by the DB. G

[15] On 20 January 2020 the DC found that the respondent was dishonest and committed fraud against the complainant. It accordingly held that the respondent was guilty and imposed a fine of RM5,000 on him.

H

[16] The DC further ordered the respondent to render the bill of charges for work done and disbursement incurred and refund the balance of the RM50,000 retainer to the complainant ('the second finding').

I

[17] On 4 February 2022, the DB wrote to the respondent stating:

(a) the DB was of the view that the DC chairman could not rely on an inference that just because a sum of RM50,000 had been paid as the retainer, then the respondent had committed fraud;

(b) there was no solid evidence to suggest that any fraud had been committed, bearing in mind that the standard of proof in disciplinary proceeding is beyond reasonable doubt;

(c) there was no finding by the DC as to whether the RM50,000 paid to the respondent was a consultant fee or for the commencement of legal action until its conclusion, except to conclude that it was meant as a retainer sum for litigation matters; and

(d) there was no bill of cost produced by the respondent to the complainant, although the receipt for payment stated that it was for 'litigation'.

[18] The DB then directed the respondent to appear before it on 26 February 2022. The respondent duly attended.

[19] On the same day, the DB issued the following order under s 103D of the LPA ('the DB order'):

> In the exercise of powers by Section 103D of the Legal Profession Act (the Act), the Disciplinary Board having on 26 February 2022, considered the report made by the Disciplinary Committee, the written submission from the Respondent dated 18 February 2022, affirmed the Disciplinary Committee's finding of liability and recommendation on punishment for fine and upon hearing the Respondent together with Mr Verghese Aaron Mathews, the counsel for the Respondent pursuant to Section 103D(2) and Section 103D(4) of the Act, IT IS HEREBY ORDERED pursuant to Section 103D(1) of the Act, the Respondent do pay a fine of Ringgit Malaysia Five Thousand (RM5,000.00) only payable to the Discipline Fund within one (1) month from the date of this Order AND IN DEFAULT THEREOF Section 103(1) of the Act shall apply.

[20] Pursuant to that, the respondent filed an originating summons ('OS') to appeal against the said DB order.

[21] The Bar Council filed an application to intervene in the OS.

[22] On 9 August 2022, the learned High Court judge ('HCJ') allowed the application to intervene, there being no objection from the parties.

FINDINGS OF THE HIGH COURT

[23] The HCJ's focus was whether the procedure adopted by the DB when it remitted back the matter to the DC and directing the DC to make a finding on the respondent's liability and in recommending punishment in the event the respondent was guilty, was correct in law.

[24] The HCJ did not find the appellant's argument that pursuant to r 28 of

the Legal Profession (Disciplinary Proceedings) Rules 2017 ('2017 Rules'), the DB is empowered to do so, to be tenable. A

[25] Rule 28 provides as follows:

> The Disciplinary Board may give such directions to the Disciplinary Committee on matters of procedures as the Disciplinary Board think fit. B

[26] The HCJ held that the 'directions' referred to in r 28 are limited to matters of procedures. They do not concern matters of a substantive nature, such as the finding of guilt or otherwise. C

[27] The HCJ found that the DC, in its first finding, did not make an affirmative finding of guilt of the respondent and that in itself is a decision that the DB should have acted upon under s 103D of the LPA. D

[28] The HCJ also said that given that the standard of proof is beyond reasonable doubt, the DB ought to have the finding as a dismissal of the complaint. E

[29] The HCJ thus concluded that the DB had committed an error when in its in its letter dated 19 April 2019 to the DC it stated that 'your Committee did not make a finding as to whether the Respondent is liable or otherwise'.

[30] The HCJ held further that neither r 28 of the 2017 Rules nor s 103D of the LPA authorises the DB to remit the matter to the DC. F

[31] Section 103D(1) of the LPA allows the DB to make an order affirming or rejecting the finding of the DC. If the DB rejects the finding of the DC, the DB shall record the reason for the rejection. Section 103D(3) provides that where the DB disagrees with the finding of the DC, the DB shall make such other order as it deems just. G

[32] In any event, the HCJ said, it does not provided for the matter to be remitted back to the DC as if this were the case, it would result in no end to the complaint. H

[33] The HCJ finally held that if the DB was not agreeable with the findings of the DC, what it should have done is to reject the finding and substitute it with its own. I

[34] If, after substituting it with its own decision on the issue of liability, and finding it necessary to impose any punishment, then under s 103D(4), it shall

notify the respondent of its intention to do so and give him a reasonable opportunity to be heard.

[35] The HCJ therefore held that the DB had committed an error of law that warranted appellate intervention and, in the premises, allowed the appeal by the respondent and set aside the DB order.

PARTIES SUBMISSIONS

The appellant

[36] In summary, the appellant assailed the findings of the HCJ on the grounds that it treated the DCs first report dated 13 March 2018 as a 'first finding' when it was not.

[37] The appellant submitted that the DCs report dated 13 March 2018 was not a finding on liability but that the DC were just stating their reasons for the need to refer the matter to the DB for a ruling in respect on 'retainer'.

[38] It was thus contended that there was a misdirection by the HCJ when he failed to direct his mind to the fact that at the time of the issuance of the letter dated 19 April 2019 no finding was in fact made by the DC.

[39] The appellant also submitted that on the merits of the complaint, the complainant had satisfied the required burden of proof when it was clear that the respondent had failed to obtain a sanction from the Insolvency Department for the complainant to institute legal action despite knowing that the complainant was an undischarged bankrupt.

[40] The appellant's further said that the respondent did not furnish the complainant with any legal opinion, written or oral to appraise the complainant of her legal position.

[41] The burden had thus shifted to the respondent to prove that the sum of RM50,100 was for a retainer fee for other litigation matters apart form that against CIMB Bank.

[42] The appellant also submitted that the HCJ had erred in construing r 28 of the 2017 Rules to be limited to matters of procedure and not matters of a substantive nature.

The respondent

[43] The respondent submitted that the plain wordings of r 28 of the 2017 Rules clearly deals only with matters of procedure. As the purpose of the remit back to the DC by the DB was on a matter of a substantive nature, it contravened the scope of r 28.

[44] The respondent further submitted that given that the standard of proof for misconduct was beyond reasonable doubt, the DC first findings that there is clear ruling regarding the retainer and thus making it improper and unsafe for the DC to issue any ruling against the respondent, ought to have treated as absolving the respondent from culpability.

[45] The respondent also submitted that it made no sense for the DB's second findings to conclude after approximately two years had elapsed, that the respondent had acted dishonestly and had committed fraud when no new evidence was presented after the first find by the DC.

[46] Finally, the respondent submitted that the purpose of the sum of RM50,000 was in fact for a retainer to act for all of the legal matters involving the complainant which included review of documents, attendance at meetings with the KWSP, insolvency offices and travel between Kuala Lumpur and Johor Bahru and not just to file an action against CIMB Bank.

ANALYSIS AND FINDINGS

[47] As stated at the outset, the HC's focus was whether the procedure adopted by the DB when it remitted back the matter to the DC and directing the DC to make a finding on the respondent's liability and in recommending punishment in the event the respondent was guilty, was correct in law.

[48] This was also recognised in the submission filed by the appellant which stated in no uncertain terms that the decision of the HC was grounded predominantly on its finding that the DB, in remitting the matter to the DC through its letter dated 19 April 2029 had committed an error of law.

[49] It is also pertinent to note that from a summary of the memorandum of appeal filed by the appellant, their appeal is premised upon the argument that the HCJ had erred on two counts, firstly, in considering the DCs first report dated 13 March 2018 as a 'first finding' and secondly, in deciding that the phrase 'directions' under r 28 of the 2017 Rules are limited to matters of procedure.

[50] Our analysis will therefore address these points raised.

[51] The grounds of judgement of the HCJ showed that he had carefully set

A out and analysed r 28 and correctly concluded that the phrase 'directions' in r 28 were by virtue of their ordinary and plain reading, limited to matters of procedure only.

B **[52]** The HCJ opined that the said rule did not at all deal with matters of a substantive nature. He held accordingly that these did not concern the question of whether the respondent was guilty or otherwise.

C **[53]** The HCJ then referred to the grounds as stated by the chairman of the DC and rightly concluded that it was apparent that the DC had decided that the respondent was not guilty of the charges levelled against him.

[54] The HCJ said that the finding made by the DC was of itself a decision that the DB ought to have acted upon under s 103D of the LPA.

D

[55] The HCJ also correctly concluded that given that the standard of proof was beyond reasonable doubt, the DB at the very least, ought to have taken the finding of the DC as a dismissal of the compliant.

E **[56]** The HCJ thus correctly found that the DB had committed an error when by way of its letter to the DC of 19 April 2019, it stated 'your committee did not make a finding as to whether the respondent is liable or otherwise'.

F **[57]** The DB had no powers accorded to it to remit the matter back to the DC in respect of a substantive finding whether of guilt or otherwise.

[58] The DC had made a clear finding of not guilty in respect of the respondent.

G

[59] Once the DC had made such a finding, the powers of the DB was either to reject or to affirm the finding as provided for under s 103D(1) of the LPA.

[60] The HCJ thus concluded, and rightly so, in our considered view that if
H the DB was not agreeable with the findings of the DC, it should have rejected the finding and substitute it with its own decision in respect of liability and if, it found it necessary to impose any punishment, to act pursuant to s 103D(4) and notify the respondent of such intention and accord him a reasonable opportunity of being heard.

I

[61] After hearing and considering submissions both oral and written, our unanimous findings is that it is clear upon a plain and obvious reading of r 28 of the 2017 Rules that the DB may only give directions to the DC on matters of procedure and not in respect of matters of a substantive nature.

[62] The HCJ had not therefore erred in finding that the DC had committed an error of law that warranted appellate intervention.

[63] In the premises, we dismissed the appeal with no order as to costs.

Appeal dismissed with costs.

Reported by Muhamad Azham Marwan